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Supreme Court, U.S.
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No. 95-1517

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1995

INDIANA DEPARTMENT OF CORRECTION,
Petitioner,

v.

BILL SAMPLEY AND MICHAEL HOLLAND,
Respondents.

BRIEF OF RESPONDENT BILL SAMPLEY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

April 22, 1996

Hamid R. Kashani
Suite 600
445 N. Pennsylvania Street
Indianapolis, Indiana 46204
317/ 632-1000
Counsel of Record

Richard A. Waples
1031 E. Washington St.
Indianapolis, Indiana 46202
317/ 635-4059

Attorneys for Respondent Sampley

1996

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REASONS FOR DENYING THE WRIT

I. THE COURTS BELOW CORRECTLY HELD THAT DISTRICT COURTS DO NOT HAVE AUTHORITY TO AWARD REIMBURSEMENT TO A STATE CUSTODIAN FOR COMPLIANCE WITH WRITS OF HABEAS CORPUS AD TESTIFICANDUM.

A. The district court did not have statutory authority to award IDOC transportation costs.

IDOC is not entitled to reimbursement under 28 U.S.C. § 1920. "Section 1920 enumerates expenses that a federal court may tax as a cost under the discretionary authority found in Rule 54(d)." *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 441 (1987). "The reasoning in *Crawford* is premised on the thesis that § 1920 *only* authorizes payments as directed by Rule 54(d)." *Sampley v. Duckworth*, 72 F.3d 528, 531 (7th Cir. 1995) (the decision below). Rule 54 allows award of costs *only* to prevailing parties. IDOC is not a prevailing party. The courts below correctly held they did not have authority to award IDOC reimbursement. *Id.*

Section 1920 provides for taxation of "fees and disbursements for printing and witnesses." 28 U.S.C. § 1920(3). Section 1821 defines the "fees and allowances" to be paid to witnesses. 28 U.S.C. §

1821(a).[1] IDOC insists that section 1821 *only* defines "fees," to the exclusion of "disbursements." It then urges that the term "disbursements" must be construed to embrace an award of transportation costs to a third-party custodian. IDOC's argument is "strained" and "flawed in its inception." 72 F.3d at 531. Section 1821, does not define just "fees" but also "allowances."[2] The "allowances" include transportation and accommodation costs. As the Seventh Circuit noted, "it [is] quite clear that the fees and disbursements referred to in § 1920(3) are both included in § 1821." 72 F.3d at 531. Moreover,

> [m]any, if not most, of the items covered by § 1821 are not "fees" in any sense of the term. These items, such as travel reimbursements, are deemed "allowances" by § 1821. Surely they could easily qualify as disbursements under § 1920(3). Nothing more than this natural reading of § 1821 is needed to save the word "disbursements" in § 1920 from statutory oblivion.

Id.

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[1]Section 1821(f), prohibits award of fees and allowances to incarcerated witnesses.

[2]IDOC's argument that section 1821 *only* defines "fees" is really baseless. The statute itself refers to "fees and allowances." 28 U.S.C. § 1821(a)(1).

In short, section 1821 defines items of costs "allowed," to be "disbursed" under section 1920, pursuant to the procedure of Rule 54. This statutory framework does not leave any room for IDOC's argument that "disbursements" should include the transportation costs of a third-party custodian. IDOC's argument is simply a "house of cards." 72 F.3d at 531.

B. The district court did not have authority, under the common law context of section 2241, to award IDOC transportation costs.

Some 207 years ago, Congress authorized writs of habeas corpus ad testificandum by enacting section 14 of the Judiciary Act of 1789, now codified in relevant part at 28 U.S.C. § 2241(c)(5). Since then, federal courts have had authority to issue the writ and state custodians have been required to bear the cost of transporting prisoners to court as a cost incident to incarceration. "At no time has that authority [to issue the writ] even been qualified by a requirement that the respondent custodian, state or federal, be compensated for compliance with the writ." *Story v. Robinson*, 689 F.2d 1176, 1179 (3d Cir. 1982).

> [T]he proper inquiry is whether Congress, which authorized district courts to issue [the writ], ever authorized reimbursement for the costs of compliance with a writ. We have not found any such Congressional authorization, nor has

> appellant cited to us a statute that would authorize reimbursement.

Wiggins v. County of Alameda, 717 F.2d 466, 469 (9th Cir. 1983), *cert. denied sub nom. California Dept. of Corrections v. United States*, 465 U.S. 1070 (1984).

The fact that Congress enacted 28 U.S.C. § 2241(c)(5) does not create a presumption that there ought to be a provision for reimbursement. "Enactment of a statute, compliance with which will require a state or entity to incur costs, does not in itself create a right of reimbursement." *Wiggins*, 717 F.2d at 469; *Sampley*, 72 F.3d at 532.

The expenses imposed on state custodians are in line with those imposed on other individuals summoned to court and given a modest per diem witness fee. "The fees are modest, and attendance frequently imposes serious financial burdens on witnesses. They must nevertheless respond without compensation, for *in our society the court's need for witness testimony is recognized as an ample justification for imposing such a burden.*" *Story*, 689 F.2d at 1179 (emphasis added). IDOC is not entitled to preferential treatment.

IDOC' claim that it is powerless to oppose the writ, *Petition* at 9, is without merit. IDOC had the opportunity to move to quash the writs. It did not do so. Nevertheless, the defendant superintendent who is a high ranking IDOC official opposed the prisoners'

motion for transportation orders. (R. 154, ¶ e, at 8).[3] The district court considered all papers, before issuing its orders. IDOC was entitled to no more process:

> Subpoenaed witnesses can move to quash such process on the ground of burdensomeness. If, however, the court concludes that the burden is justified by the necessities of the judicial process, the witness must bear it. We see no reason why any additional procedural safeguards should be afforded to custodians of witnesses.

Story, 689 F.2d at 1180.

Once the district court determines the production of prisoner witnesses is necessary for the case, the custodian must bear the transportation cost.

> [The state custodian's] position is that no matter how vital the testimony is or how important a prompt disposition of the case is to the parties, state custodians need not produce prisoner witnesses at state expense. *We reject that contention.*

Story, 689 F.2d at 1181 (emphasis added).

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[3]The defendant was represented by Indiana Attorney General's office.

II. THIS CASE DOES NOT PRESENT A CONFLICT AMONG THE CIRCUITS.

IDOC admits this case presents "no technical circuit conflict within the meaning of this Court's Rule 10.1." *Petition* at 11. Indeed, courts of appeals reaching the question have uniformly held state custodians must bear the cost of transporting their prisoners pursuant to writs of habeas corpus ad testificandum. *Sampley*, 72 F.3d 528 (7th Cir. 1995); *Sales v. Marshall*, 873 F.2d 115 (6th Cir. 1989); *Wiggins*, 717 F.2d 466 (9th Cir. 1983); *Story*, 689 F.2d 1176 (3d Cir. 1982).

In *Wiggins*, the Ninth Circuit upheld allocation to state of all transportation costs in compliance with a writ of habeas corpus ad testificandum. 717 F.2d at 469. To buttress its argument of an inter-circuit conflict, IDOC argues *Wiggins* holds district courts have discretion to allocate transportation costs to *anybody*. That is not true. *Wiggins* only "concluded that the district court had discretion to allocate costs of transportation of a state prisoner *between state and federal authorities*." *Sampley*, 72 F.3d at 532 (emphasis added). *Wiggins*, never held that the transportation cost may be assessed against the losing prisoner. "When there is no statutory authority . . . authorizing reimbursement to the state for the costs of compliance with [a writ of *habeas corpus ad testificandum*], then

there is no basis upon which the state can seek compensation for its expenses." 717 F.2d at 469.[4]

IDOC's citation to *Flint v. Hayes*, 651 F.2d 970 (4th Cir. 1981), *cert. denied*, 454 U.S. 1151 (1982), is inapposite. The district court in *Flint* had assumed the cost of transportation was a cost born by the defendant, as opposed to a third party. As IDOC admits, "[t]his allocation was not even challenged on appeal." *Petition* at 11. Thus, *Flint* "focused entirely on the question whether costs may be taxed against indigents *at all*." *Sampley*, 72 F.3d at 532. The Fourth Circuit never reached the question whether a third party custodian may recoup the cost of its compliance with writs of habeas corpus ad testificandum.

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[4]To the extent *Wiggins* allowed allocation of expenses to U.S. Marshals, it was overruled by this Court in *Pennsylvania Bureau of Correction v. United States Marshals Srvc.*, 474 U.S. 34 (1985), which was decided one (1) year after Justice Rehnquist dissented from denial of certiorari in *California Dept. of Corrections*, 465 U.S. 1070.

III. THIS CASE DOES NOT PRESENT AN IMPORTANT, UNRESOLVED QUESTION WORTHY OF THIS COURT'S CONSIDERATION.

IDOC makes a number of policy-based arguments in support of its position. Those arguments are more appropriately addressed to a legislative rather than a judicial body. IDOC's policy arguments are not relevant to whether certiorari should be granted. They are misleading in part, incomplete at best, and deserve a short response.

A. Requiring prisoners to pay the cost of transporting prisoner witnesses to trial does not discourage frivolous lawsuits, because frivolous lawsuits never get to trial.

This appeal has nothing to do with frivolous lawsuits. By the time the district court issues the writ, the prisoner must have met a number of very stringent tests:

(1) Scrutiny under 28 U.S.C. § 1951 (the *in forma pauperis* statute), that the claim is not frivolous;

(2) Determination under Rule 12(b)(6) (motions to dismiss), that the case presents a valid legal claim for which relief may be granted;

(3) Finding under Rule 56 (motions for summary judgment), that the case presents a genuine

issue of material fact which must be resolved only at a trial; and

(4) Decision under 28 U.S.C. § 2241, that the particular witnesses sought are necessary for the prisoners to prove their case.

Here, the district court allowed prisoners to proceed under 28 U.S.C. § 1951. Defendants filed motions for summary judgment. After extensive litigation, the district court allowed prisoners to pursue their right of access to courts claim and denied their remaining claims. Prisoners requested issuance of writs of habeas corpus ad testificandum, and the defendant opposed them. The district court denied some of prisoners' requests and determined that only nine (9) prisoner witnesses were necessary to testify at trial.

Frivolous prisoner lawsuits never make it to trial. IDOC position would have the real effect of suppressing legitimate and substantial constitutional claims of prisoners.

B. There has been no explosion in the number of prisoner lawsuits.

In attempting to buttress its policy argument of why prisoners ought to pay transportation costs, IDOC claims that from 1985 to 1995, the number of prisoner lawsuits increased from 18,595 to approximately 40,000. *Petition* at 4-5. What IDOC neglects to tell the Court is that during the same period the number of prisoners in

this country also increased from 502,507[5] to over 1,104,074.[6] Indeed, the per capita filings of prisoner lawsuits has experienced a slight decline of about 3 % over the last decade.

IDOC suggests that all prisoner lawsuits are frivolous. IDOC cites no evidence for its position but quotes extensively from newspaper articles which are based on self-serving statements of state officials never subjected to cross-examination. No doubt, considering the volume it would be inevitable that some prisoners suits are frivolous.[7] But, many prisoner lawsuits

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[5]Bureau of Justice Statistics, *Prisoners in 1994* at 1 (Aug. 1995).

[6]Bureau of Justice Statistics, *Prisoners at Midyear 1995* (Dec. 3, 1995).

[7]There are other reasons why some prisoner cases are lost or even held frivolous: (1) prevalent functional illiteracy among prisoners, (2) extraordinary legal complexity of eighth and fourteenth amendment cases, (3) unavailability of counsel, (4) prison officials' almost total control of evidence in prison's closed environment, (5) prisoners' inability to carry on factual investigations in prison, and (6) the procedural mine field that section 1983 litigants must clear.

continue to present important and vital issues for judicial consideration.[8]

A large segment of our society is composed of individuals who have been either convicted or incarcerated during some period of their lives. At yearend 1994, 5.1 million Americans were on probation, in jail or prison, or on parole. That is nearly 2.7 % of all adult residents in the United States. Bureau of Justice Statistics, *Corrections Statistics* (1996). Most prisoners are indigent. If they were required to pay the

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[8]*See e.g., Farmer v. Brennan*, 511 U.S. ___, 114 S. Ct. 1970 (1994) (deliberate indifference standard for prisoner's reasonable safety needs); *Hudson v. McMillian*, 503 U.S. 1 (1992) (use of force by prison guards); *Turner v. Safley*, 482 U.S. 78, 90-91 (1987) (prisoners' exercise of religious rights); *Whitley v. Albers*, 475 U.S. 312, 320 (1986) (use of force during riots); *Block v. Rutherford*, 468 U.S. 576, 589 (1984) (contact visits); *Rhodes v. Chapman*, 452 U.S. 337 (1981) (to invoke the eighth amendment, prisoners must show that prison officials were deliberately indifferent to their serious medical needs); *Bell v. Wolfish*, 441 U.S. 520, 550 (1979) (access to publications and hardback books); *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119, 129 (1977) (prisoners' solicitation and group meetings); *Pell v. Procunier*, 417 U.S. 817, 827 (1974) (media interviews); *Wilkerson v. Utah*, 99 U.S. 130, 136 (1879) (prohibiting "torture" and "unnecessary cruelty" against prisoners).

transportation costs of necessary witnesses, the majority of prisoners' legitimate claims affecting their liberty, their safety in today's violent prisons, and brutal conditions of their confinement will never reach trial. Neither Congress nor the courts should close their eyes to the plight of such a large segment of the society:

> There are different ways to look upon the inmates of prisons and jails in the United States in 1995. One way is to look upon them as members of a different species, indeed as a type of vermin, devoid of human dignity and entitled to no respect; and then no issue concerning the degrading or brutalizing treatment of prisoners would arise. . . .
>
> I do not myself consider the 1.5 million inmates of American prisons and jails in that light. This is a non-negligible fraction of the American population.

Johnson v. Phelan, 69 F.3d 144, 151 (7th Cir. 1995) (Posner, C.J., dissenting).

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

April 22, 1996

Hamid R. Kashani
Suite 600
445 N. Pennsylvania Street
Indianapolis, Indiana 46204
317/ 632-1000

Counsel of Record

Richard A. Waples
1031 E. Washington St.
Indianapolis, Indiana 46202
317/ 635-4059

Attorneys for Respondent Sampley